Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions	)	
of the Telecommunications Act of 1996	)	

COMMENTS OF MCI WORLDCOM ON FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

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EXECUTIVE SUMMARY

Use restrictions that would allow ILECs to prevent CLECs from using unbundled network elements to provide network access services would be both unlawful and bad policy. As the Commission has already held, section 251(c)(3) prohibits use restrictions of any kind. 47 U.S.C. § 251(c)(3). The result that the law compels is also that which best advances the Commission's competitive policies. After all, use restrictions are an issue if, and only if, the cost-based price for unbundled loops and transport is significantly less than the price of special access. If competition has forced the price of special access to cost, continuing to allow CLECs to use loop/transport combinations solely for access traffic as a substitute for special access will have no impact whatsoever on ILEC revenue, on universal service, or on anything else. Thus, any access use restriction must be premised on the notion that special access prices are substantially above cost. This Commission should view such monopoly prices for special access as a serious problem to be solved, not as a desirable status quo to be preserved.

In fact, the Commission's goal has been for years to reduce the price of special access to cost, and its long-standing policy is that special access does not subsidize other services. Consequently, there is no policy reason to defend inflated special access rates; monopoly profits from special access benefit only the ILECs. Moreover, although CLECs and CAPs have legally been able to provide facilities-based alternatives for several years, a competitive market has not yet developed in the vast majority of geographic locations and special access is not priced ubiquitously at cost. The UNE-based competition that ILECs seek to restrict would significantly facilitate the FCC's goal of cost-based access. ILEC claims that they should be permitted to delay this competition and continue to earn monopoly profits on special access, then, are

fundamentally contrary to this Commission's precedents. The extraordinary relief ILECs seek benefits only them and is both bad law and bad policy.

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MCI WORLDCOM, Inc. ("MCI WorldCom") hereby responds to the Commission's request for comment on whether there is any basis in law or policy for a rule restricting requesting carriers from using unbundled network elements to provide exchange access services. As we show in what follows, any such restriction would be both unlawful and unwise.

Introduction

In its Third Report and Order in this proceeding,[1] the Commission correctly concluded that competitive local exchange carriers ("CLECs") are "impaired" in their ability to offer the "service[s] that [they] seek[] to offer," 47 U.S.C. § 251(d)(2)(B), without access to both the incumbent local exchange carrier's ("ILEC's") loops and transport facilities.[2] The Commission also correctly concluded that, leaving aside the question of "new" combinations now before the Eighth Circuit, requesting carriers have a right and a need to order these two elements in combination.[3] Accordingly, there is no dispute that these elements must be made available to requesting carriers on an unbundled basis. 47 U.S.C. § 251(d)(2).

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[1]Third Report and Order and Fourth Notice of Proposed Rulemaking, In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("UNE Remand Order").

[2]Id. ¶¶ 162-201 (loops); 318-379 (transport).

[3]Id. ¶¶ 474-482.

In the UNE Remand Order, however, and in a subsequent Order supplementing that Order,[4] the Commission took note of concerns raised by certain ILECs that transport elements, or loop and transport elements in combination, could be used by requesting carriers as a substitute for access services they currently purchase from ILECs, see UNE Remand Order ¶ 485, and that such substitution "potentially could cause a significant reduction of the incumbent LEC's special access revenues prior to the full implementation of access charge and universal service reform." Id. ¶ 489.

Based on these concerns, in the UNE Remand Order and Supplemental Order the Commission allowed ILECs to impose a series of temporary use restrictions on the loop and transport elements and asked for comment on the legality and wisdom of these restrictions and of related restrictions proposed in an earlier Order.[5] Specifically, the Commission "allow[ed] incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service," Supplemental Order ¶ 4, except when a requesting carrier provides "a significant amount of local exchange service . . . to a particular customer" through the leased combination of elements. Id. ¶ 5. Similarly, the Commission allowed incumbents to prohibit the use of dedicated transport network elements between the incumbent's serving wire center and an interexchange carrier's entrance facility when the requesting carrier seeks to use the element to provide exchange access service. UNE Remand

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[4]Supplemental Order, In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-370 (rel. Nov. 24, 1999) ("Supplemental Order").

[5]UNE Remand Order ¶ 496 (referring to Shared Transport, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 12 FCC Rcd 12460, ¶ 3 (1997) ("Shared Transport Third Order on Reconsideration")).

Order ¶ 489. Finally, in an earlier order, the Commission proposed restricting the use of all unbundled shared and dedicated transport facilities used exclusively for access services. Shared Transport Third Order on Reconsideration ¶¶ 60-61.

As MCI WorldCom shows in what follows, these use restrictions are both illegal and unwise. Once the Commission has determined that an element should be unbundled based on consideration of all relevant factors, including those listed in 47 U.S.C. § 251(d)(2), section 251(c)(3) of the Act requires ILECs to provide unlimited access to all of the functions and capabilities of that element for the provision of all telecommunications services. A rule limiting unbundling to preserve above-cost pricing of access services also would be illegal because it would constitute an arbitrary and capricious departure from sound and well-settled Commission policies. Nor can such a regulation be saved by calling it "temporary." In any event, these use restrictions undermine competition in both local and long-distance markets, and are unsound as a matter of policy.

I. Network Element Use Restrictions Are Unlawful.

A. Use Restrictions Violate the Plain Terms of the Act.

As the Commission acknowledges, it has previously concluded that section 251(c)(3) "permits interexchange carriers and all other requesting [telecommunications] carriers to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers." UNE Remand Order ¶ 484 (quoting First Report and Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, ¶ 356 (1996) ("Local Competition Order")). The Commission stressed that "we believe that our interpretation of section 251(c)(3) . . . is compelled by the plain language of the

1996 Act . . . [since] section 251(c)(3) provides that requesting telecommunications carriers may seek access to unbundled elements to provide a 'telecommunications service,' and exchange access and interexchange services are telecommunications services." Local Competition Order ¶ 356 (emphasis added).

Use restrictions also are squarely foreclosed by section 251(d)(2). That provision requires the Commission to consider whether each particular network element should be made available "for the purposes of section 251(c)(3)," that is, for the purpose of providing telecommunications services, based upon considerations that include, at a minimum, whether denial of access would impair the ability of a CLEC to provide the "services it seeks to offer." Critically, "network element" is in turn defined to mean "a facility or equipment used in the provision of a telecommunications service . . . includ[ing] features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29). The statute, then, expressly provides that a CLEC that is entitled to access to a particular network element is entitled to all of the "functions and capabilities" that element provides, to enable the CLEC to provide telecommunications services. Cf. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 734 (1999) (observing the importance to the statutory scheme of "the breadth of th[e] definition" of "network element"). The network, then, is to be unbundled only on an element-by-element basis, and once the Commission has concluded that an element should be unbundled, no further restriction based on the use to which the CLEC intends to put the element is allowed, so long as the element is used to provide a telecommunications service. Partial unbundling, or a rule that allows access to only some of an element's telecommunications functions and capabilities, is flatly inconsistent with this statutory framework.

This clear legal prohibition applies equally to all of the use restrictions under consideration. The temporary restrictions on certain loop-transport combinations, the temporary restriction on the transport link to the serving wire center, and the proposed restrictions on all shared or dedicated transport that were the subject of the Shared Transport Third Order on Reconsideration each would allow ILECs to deny CLECs access to specified telecommunications uses of otherwise available network elements, solely on the ground that CLECs intend to use them to provide a particular kind of telecommunications service. The Commission's conclusive determination in the Local Competition Order that such use restrictions violate section 251(c)(3) is equally fatal to all of these proposals.

Seeking to avoid the plain requirements of section 251(c)(3), in ex partes filed in this proceeding several ILECs have taken issue with that conclusion, recycling the same legal arguments they made unsuccessfully in the Local Competition Order rulemaking.[6] No new facts or changed legal or policy analysis or have been presented to the Commission that provide grounds for it to reverse its position on this critical matter. See Motor Vehicle Mfrs. Assoc. of U.S. v. State Farm Mut. Ins. Co., 463 U.S. 29, 41-42 (1983). Moreover, these previously rejected legal arguments continue to lack all merit.

First, the ILECs argued that section 251(c) allows them to impose "just" and "reasonable" terms and conditions upon access to network elements. But "just" and "reasonable" are terms whose substance is derived from the context within which they are used. Here, the statute expressly provides that leased elements can be used to provide "telecommunications services,"

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[6]See, e.g., Ex Parte filing of BellSouth Corporation, Letter from William B. Barfield, Assoc. Gen. Counsel to Lawrence E. Strickling, Chief, Common Carrier Bureau, CC Docket No. 96-98 (filed Aug. 9, 1999); Ex Parte filing of SBC Telecommunications, Inc., Letter and legal brief from Martin E. Grambow, Vice President and General Counsel to Lawrence E. Strickling, Chief, Common Carrier Bureau, CC Docket No. 96-98 (filed Aug. 11, 1999).

and exchange access services indisputably are telecommunications services. Plainly it would be neither just nor reasonable within this statutory scheme to allow ILECs to prevent requesting carriers from using unbundled network elements to provide one class of telecommunication services. To do so would be to substitute the phrase "local exchange services" for "telecommunications services" in section 251(c). It is neither "just" nor "reasonable" for the Commission to substitute its language for that of Congress.

Next, the ILECs argued that use restrictions are necessary to preserve the existing access charge regime, and that section 251(g) compels that this regime be preserved until replaced with another regime. But the Commission previously correctly concluded that while section 251(g) requires that universal service reform be considered along with access charge reform, this provision does not apply in any way to the new unbundling requirements of the Act. In particular "this provision does not apply to the exchange access 'services' requesting carriers may provide themselves or others after purchasing unbundled elements." Local Competition Order ¶ 362. The ILECs' reading of section 251(g) would make it impossible to implement any of the Act's unbundling requirements until the completion of universal service reform. But the Act's own timing sequence shows that this is an impermissible construction of section 251(g), since Congress to the contrary required the Commission to enact unbundling rules before, and not after, the completion of universal service reform.

Finally, the ILECs argued that section 252(i), which preserves the Commission's regulatory authority to set rates for services under section 201, preserves the Commission's right to impose restrictions on leasing regardless of the language of the Act's leasing restrictions. As to this as well, the Commission in the Local Competition Order already reached the contrary conclusion, finding that "our authority to set rates for these services is not limited or affected by

the ability of carriers to obtain unbundled elements for the purpose of providing interexchange services." Id. ¶ 358. The ILECs have not offered any evidence that would undermine this conclusion.

Nor was the Commission's definitive pronouncement in the Local Competition Order in any way limited to the situation in which a CLEC uses a UNE for both access and telephone exchange traffic, rather than exclusively for access traffic. As the above-quoted portion of that Order makes clear, the Commission expressly considered and rejected the proposition that CLECs can be prevented from using UNEs for the sole purpose of originating and terminating exchange access traffic. A LEC providing a loop used exclusively to originate and terminate access traffic is providing a "telecommunications service" every bit as much as a LEC providing the same loop for commingled access and local traffic, or, for that matter, exclusively for local traffic. As the Commission previously concluded, there is no getting around this statutory language.

In arguing that the Commission has previously considered only the use of elements for commingled local and access services, the ILECs have pointed to the Commission's statement that the risks of arbitrage of which the ILECs complain are minimal, since most customers use their phone lines for both local and long distance traffic. This was not, however, stated as a limitation on the rule that CLECs had the absolute right to determine which telecommunications services to offer over leased elements, but rather as an explanation as to why there was no need for any such limitation. See, e.g., Local Competition Order ¶ 357 ("interexchange carriers

purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops") (emphasis added).[7]

In sum, Congress expressly mandated that elements be available to requesting carriers to provide telecommunications services, and not simply local exchange services. The use restriction under consideration unlawfully violates that mandate.

B. The Proposed Use Restriction Is Arbitrary and Capricious.

Not only are use restrictions contrary to the plain meaning of the 1996 Act, the use restriction concerning access service proposed here is so at odds with many of the other policy judgments made by the Commission in regulating under the 1996 Act that its implementation would be arbitrary and capricious, and for that reason as well unlawful.

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[7]In the Further Notice that accompanied the Shared Transport Third Order on Reconsideration, the Commission inquired whether its ruling in its previous Local Competition Order on Reconsideration undercut in any way the Commission's initial conclusion that use restrictions are unlawful. Shared Transport Third Order on Reconsideration ¶ 61 (referencing Order on Reconsideration, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 13042,(1996) ("Local Competition Order on Reconsideration")). See also UNE Remand Order ¶ 496 (requesting comments on the questions raised in the Shared Transport Third Order on Reconsideration).

The answer to that question is that the Commission has never in any context raised any doubt about its conclusion that use restrictions violate section 251(c)(3). In the Local Competition Order on Reconsideration the Commission observed that the unbundled local switching element includes a switch line port that is dedicated to a particular customer loop. See Local Competition Order on Reconsideration ¶ 11. Since, "as a practical matter," id. ¶ 12, most customers need their loops for both local and long-distance service, the Commission in its Local Competition Order on Reconsideration simply "ma[d]e clear that, as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier." Id. ¶ 13. Because the line port is part of the unbundled local switching element, and because a customer's switched traffic includes both local and long-distance traffic, CLECs that make use of ILEC unbundled local switching will be switching both local and long-distance traffic. By acknowledging this fact, however, the Commission was not in any way making an exception to its understanding that the statute prohibited use restrictions under any circumstances.

The sole proposed justification for this prohibition is that without it the ILECs risk losing revenue "prior to the full implementation of access charge and universal service reform." UNE Remand Order ¶ 489. In other words, the prohibition is designed to protect implicit universal service subsidies. The short and sufficient answer to this is that it is "established Commission practice that special access will not subsidize other services," First Report and Order, In re Access Charge Reform, 12 F.C.C.R. 15982, ¶ 404 (1997) ("Access Charge Reform Order"). It is arbitrary and capricious to adopt a policy to protect a subsidy that the Commission has found should not exist.

The Commission's passing reference to access charge reform is equally unavailing. Rather than reduce access charges to cost solely by administrative fiat, the Commission has instead adopted a policy that explicitly relies on competition through unbundled network elements as the cornerstone of access charge reform, relying on the fact that competitive pressures caused by competition through UNEs will lead to a reduction in access charges to cost. See Access Charge Reform Order ¶ 262 (noting intent to promote competitive market, where access charges will come down to cost in part because "interstate access services can be replaced with some interconnection services or with functionality offered by unbundled elements," and 1996 Act creates a cost-based pricing requirement for interconnection and UNEs); id. ¶ 48 (intending to reduce access charges by "generat[ing] workable competition over the next several years"). See also id. ¶¶ 9, 35, 42, 280. A use restriction whose very purpose is to deter competition in access services for the purpose of preserving supra-competitive access charges is directly contrary to that policy. Once again, a regulation whose stated purpose is to undermine one of the cornerstones of the Commission's competition policy is the height of irrationality.

In sum, the proposed use restriction undermines a series of related Commission policies, and its adoption would be the height of arbitrary and capricious rulemaking.

C. Labeling the Use Restriction "Provisional" Does Not Make It Legal.

In its Notice, the Commission tacitly acknowledges these concerns, but notes that it has inherent authority to implement temporary transitional rules. UNE Remand Order ¶ 492. In this regard, it points to a transitional rule in the Local Competition Order imposing non-cost-based charges for certain elements associated with switched access, which was affirmed by the Eighth Circuit. See Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068, 1073-75 (8th Cir. 1997) ("Comptel").

It is true that agencies are entitled to substantial deference regarding interim relief. See MCI Telecommunications Corp. v. FCC, 750 F.2d 135, 140 (D.C. Cir. 1984). However, this deference is based on "the understanding that the agency may reasonably limit its commitment of resources to refining a rule with a short life expectancy." Competitive Telecommunications Ass'n v. FCC, 87 F.3d 522, 531 (D.C. Cir. 1996) (holding that FCC did not sufficiently justify interim rate structure that had been in effect for years), enforcement denied, No. 95-1169, 1998 WL 135461 (D.C. Cir. Feb. 20, 1998) (denying enforcement due to transfer to Eighth Circuit). But not even an "interim" rule lawfully can violate the act it is designed to implement. See 47 U.S.C. § 154(i) (the Commission "may perform any and all acts . . . not inconsistent with this [Act]"); United States v. Storer Broad. Co., 351 U.S. 192, 203 (1956) ("§ 154(i) . . . grant[s] general rulemaking power not inconsistent with the Act or law").

Comptel is not to the contrary. In the temporary rule endorsed in Comptel, the Commission sought to harmonize two statutory deadlines it believed to be in tension with each other. It did not, and did not purport to, violate any express terms of the 1996 Act.

Specifically, in Comptel, the court upheld the Commission's ten-month transitional rule allowing non-cost-based charges for elements used for switched access because of the Act's "nine-month disparity between the deadline for implementation of cost-based service and the deadline for reform of universal service." Comptel, 117 F.3d at 1074. Because the nine-month disparity in deadlines raised "the threat of serious disruption in universal service," the court held that the transitional rule was appropriate "to effectuate [the universal service provisions] of the Act." Id.

The court thus accepted the Commission's judgment that the limited exception enacted in the Local Competition Order was necessary because it had not had the opportunity to consider how it would "create a new system of funding universal service," and, given the ambitious six-month statutory time frame to promulgate rules to implement section 251, was unable to "take into account the effects of the new rules on our existing access charge and universal service regimes." Local Competition Order ¶ 716. In light of these concerns, in response to ILEC arguments that these brand new commercial arrangements threatened universal service funding, the Commission felt that it was necessary to apply a small part of the existing access charge regime to certain UNE leasing requirements for a 10-month period.

The situation in Comptel that justified allowing traditional universal service principles to take precedence over the pricing standards of the 1996 Act no longer exists. The dates for implementation of sections 251, 252, and 254 of the Act have long passed, the universal service order has been entered, and the nine-month disparity between the local competition and universal service provisions has no continuing relevance. Two years have passed since the end of the Commission's temporary imposition of access charges related to switched access. The use restriction cannot plausibly be defended as an effort to harmonize the Act's provisions: the

Commission has now concluded that the provisions are already harmonized, with UNE competition designed to drive access charge and universal service reform. Instead, imposition of this rule, even temporarily, would simply be an illegal attempt to re-write the law.

Additionally, though it is defended only as a "provisional" measure, there is substantial danger that the proposal here, unlike the ten-month exception addressed in Comptel, would survive not just for some limited time, but indefinitely. The Commission itself has been unable to complete federal universal service reform promptly. See Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999), petition for cert. filed sub nom. Celpage Inc. v. FCC, 68 U.S.L.W. 3433 (U.S. Dec. 23, 1999) (No. 99-1072). Additionally, the ILECs have undertaken extensive regulatory and litigation action to delay the full implementation of universal service reform. See, e.g., id.; GTE Petition for Reconsideration, In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 96-98, (filed Jan. 4, 2000) (seeking further extension of "temporary" stay of FCC deaveraging requirement). Tying requesting carriers' access to UNEs for exchange access services to "full implementation" of universal service reform, as ILECs suggest, see UNE Remand Order ¶ 489, will increase ILEC incentives to delay further such implementation. Moreover, even though intrastate special access generates very limited revenues for ILECs, one can readily envision an ILEC argument that the availability of UNEs as a substitute for intrastate special access would reduce the level of intrastate universal service subsidies currently in intrastate special access rates, and thus the use of UNEs for special access must be delayed until all states have fully implemented universal service reform at the state level. Thus, the Commission is asking parties to consider a rule that might remain in place until the states have fully implemented their own universal service reform, a process that could well take years.

In contrast, the limited preservation of certain access charges for leased switched access services that were put in place in August 1996 as part of the Local Competition Order by regulation expired in June 1997. In upholding this regulation, the Comptel court relied on the fact that the transitional rule at issue was of brief and fixed duration. See Comptel, 117 F.3d at 1073 ("It is significant to our review for unlawfulness that the CLCC and TIC presently being assessed may be collected no later than June 30, 1997."). Similarly, in defending this rule, the Commission "strongly emphasize[d] that these charges will apply . . . only for a very limited period, to avoid the possible harms that might arise if we were to ignore the effects [of the rule on the] implementation of section 251." Local Competition Order ¶ 724. Indeed, the Commission found it to be "imperative that this transitional requirement be limited in duration," and stressed that it could "conceive of no circumstances under which the [transitional] requirement . . . would be extended further." Id. ¶ 725.

Finally, the temporary rule addressed in Comptel did not violate the Commission's own universal service and access charge policies. Instead, the very purpose of the transitional rule was to allow the Commission the statutorily-provided opportunity to develop those policies. Now those policies have been implemented, and, as shown above, the ostensible purpose of this rule is contrary to those policies. The ILECs claim (wrongly, we believe, see infra) that the rule is necessary to preserve from rapid competitive assault cost structures that are grossly in excess of the true cost of the services provided, because it is Commission policy that these excessive costs be preserved until the completion of universal service reform. But the Commission has adopted a policy directly contrary to the one that underlies the proposed rule: competition through leased network elements is supposed to help drive access charges to cost. In this way as well, the proposal bears no relation to the rule affirmed in Comptel.

In sum, whatever can be said about a true provisional transitional rule designed to harmonize conflicting statutory deadlines, this rule of indefinite duration proposed some four years after the law's enactment cannot be saved by labeling it "provisional."

II. The ILEC s Rule Would Harm Competition And Be Bad Public Policy.

Even if, arguendo, the Commission could defend the legality of a rule that violated the plain terms of the Act and undermined so many of its well-established competition policies, for all of the same reasons that the proposal is arbitrary and capricious, it is of course also bad policy. The Commission should be promulgating rules to bring competition to all telecommunications markets "as quickly as possible." H.R. Rep. No. 104-204 at 89 (1995). This rule is designed "temporarily" to protect one group of competitors from the effects of competition some four years after the law's enactment. Worse still, it protects these competitors by artificially maintaining indefensibly high rates, while one of the goals of the Act is to reduce prices to consumers. It is hard to imagine a worse policy.

Use restrictions would be bad policy for other reasons as well:

First, the proposal is designed to address an emergency that does not exist. If the practices the ILECs would have the Commission proscribe presented tremendous opportunities for profitable entry, and if the CLECs could as a practical matter take prompt advantage of these opportunities, there would be some evidence in the market of the "flashcut" the ILECs fear. In fact, there has been virtually no erosion of the ILEC customer base for access services, even when those services could have been provided through discrete unbundled network elements that have generally been available over the last four years, and the ILECs have earned record profits more than adequate to meet their universal service obligations. The ILECs offer no evidence that this

situation will change in the immediate future. This is reason enough to deny the ILECs the emergency relief they request.

Indeed, what the record reflects is that over the course of the last four years CLECs have faced and will continue to face formidable barriers to entry if they seek to enter any portion of the market through the use of unbundled network elements. Undeveloped OSS systems, untested operating rules and practices, and ILEC "slow-rolling" prevent CLECs from taking advantage of whatever opportunities exist on a scale that could promptly erode the ILECs' customer base. And even leaving all of that aside, in the case of dedicated access, only a small minority of special access circuits are provided through month-to-month contracts. Instead most of the CLECs' business is governed by long-term access contracts with the ILECs. Because of these contractual obligations, and the penalties that would attach should CLECs seek immediately to convert special access lines to UNEs, CLECs cannot overnight "convert" their dedicated access business to a business served by unbundled network elements.

Second, Congress wisely decided that when CLECs lease ILEC network elements, they should be able to make any use of them they see fit to provide competing telecommunications services. With use restrictions, when CLECs lease ILEC elements, the ILECs would have the right to police the CLEC network to make sure the CLECs have the "right" kind of customers, and could (and no doubt would) strategically deny access to network elements based on purported concerns that CLECs were carrying "illegal" access traffic. There is no conceivable way to administer this use restriction without creating endless opportunities for the ILECs to subject their CLEC competitors to anticompetitive rules and practices.[8]

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[8]The original Bell Atlantic extended link tariff in New York ought to be a warning to the Commission as it considers the ILEC proposals. Bell Atlantic required a minimum of 50% local usage for this tariffed service, and indicates that it will require CLECs whose access traffic

The Commission is well aware of this problem. In allowing the use restriction rule to go into effect for a limited time, it took the extraordinary step of prohibiting the ILECs from policing compliance with the rule.[9] But a rule that cannot be enforced without causing more harm than good is not a sound rule.

Third, because of the ILECs' access pricing flexibility,[10] this use restriction will give ILECs a license to engage in price squeezes that will cause great harm to the developing market for access services. The ILECs' request amounts to little more than a plea that they be allowed to offer access services at cost-based prices when it serves their interests, but that CLECs should be prevented from doing the same. But it does not serve the public interest to allow the ILECs unilaterally to determine which customers should be required to pay inflated rates. While the ILECs suggest without any foundation that the Commission's rules will harm competitive access providers ("CAPs"), the truth of the matter is that if the ILECs are given the pricing flexibility promised to them by the Commission, unless CAPs and CLECs retain the right to lease UNEs at cost-based rates, they will be unable to respond to the anticompetitive pricing that is the inevitable consequence of the new access rules.

Fourth, the ILEC rule will deter facilities-based local competition just as surely as it will deter competitive service through unbundled network elements. CLECs' ability to use their own switching is greatly enhanced by the availability of loop/transport combinations. See UNE Remand Order ¶¶ 263-266, 288-289. Indeed, now that the Commission has adopted a rule that

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exceeds that percentage to collocate. Bell Atlantic is clear intent to police CLEC traffic in New York thus was stymied by this Commission's Supplemental Order prohibiting such policing.

[9]Supplemental Order ¶ 5 n.9.

[10]See Fifth Report and Order and Further Notice of Proposed Rulemaking, In re Access Charge Reform, 14 F.C.C.R. 14221 (1999).

limits access to ILEC unbundled local switching, CLECs are all the more dependent on loop/transport combinations to extend the reach of their switches and gain access to customers. The ILEC proposal is a dagger directed to the heart of this entry strategy: it would prevent CLECs from using leased facilities efficiently to carry all CLEC traffic to CLEC switches. The availability of loop/transport combinations, as an economic matter, depends upon CLECs being able to make full use of the dedicated leased facilities they need to carry local traffic to their switches. The ILECs freely mix access and local traffic on their transport facilities. The CLECs, who have much less traffic to begin with, will be substantially disadvantaged if they are unable to do the same. In a business characterized by often-significant economies of scale, rules that artificially prevent CLECs from enjoying the benefits of whatever economies they can generate through their own business efforts will deter the development of local competition.

Use restrictions also harm competition because ILECs refuse to allow CLECs to combine leased UNEs with access services they purchase from the ILECs. See MCI v. Bell Atlantic, FCC E-98-33 (complaint challenging Bell Atlantic's refusal to allow such commingling). Use restrictions would require CLECs to continue to use only access services to provide access, and ILEC policies prohibiting commingling would result in CLECs having to operate two discrete networks – one for access, one for local – while the ILECs themselves operate one efficient unitary network. Given that ILECs already benefit from greater economies of scale and scope than CLECs, use restrictions will put CLECs at an even greater competitive disadvantage.

Nor will the availability of lines to lease at cost-based rates deter CLECs from constructing their own access lines when that is economically feasible. Much of the access services that are sold at above-cost rates are provided through T1 circuits. These are the circuits that CLECs should be able to purchase at cost, driving down the costs to retail customers. But

construction of lines by CLECs is typically economically feasible only for larger sized trunks -- sized at T3 or above. Precisely because it is often feasible to build these larger-sized lines, the cost of access services using T3s typically is not greatly above cost. The main consequence of the application of the Commission's unbundling rules therefore will be to drive down the cost of T1 circuits -- a consequence that will have little or no effect on CLECs' decision to build competing facilities.

In sum, use restrictions hurt consumers and would do far more harm than good. They are bad policy as well as bad law.

Respectfully submitted,

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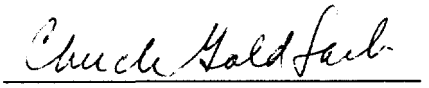

Chuck Goldfarb
Lisa B. Smith
MCI WORLDCOM, Inc.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2199

Dated: January 19, 2000

Certificate of Service

I, Lonzena Rogers, do hereby certify, that on this nineteenth day of January 2000, I have caused by hand-delivery a true and correct copy of MCI WorldCom, Inc.'s Comments in the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 to be served on the following:

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW
TW-B204
Washington, DC 20554

William Kennard
Chairman
Federal Communications Commission
445 Twelfth Street, SW
8-B201
Washington, DC 20554

Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 Twelfth Street, SW
8-A302
Washington, DC 20554

Susan Ness
Commissioner
Federal Communications Commission
445 Twelfth Street, SW
8-B115
Washington, DC 20554

Michael Powell
Commissioner
Federal Communications Commission
445 Twelfth Street, SW
8-A204
Washington, DC 20554

Gloria Tristani
Commissioner
Federal Communications Commission
445 Twelfth Street, SW
8-C302
Washington, DC 20554

Lawrence Strickling
Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
5-C450
Washington, DC 20554

Jake Jennings
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
5-C260
Washington, DC 20554

Claudia Fox
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
5-C235
Washington, DC 20554

Chris Libertelli
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
5-C234
Washington, DC 20554

Lonzena Rogers